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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., A Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Exquisite Form Brassiere, Inc., a corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 2, 1965.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is as yet unreported; it is printed herein as Appendix A.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia Circuit was entered on July 2, 1965. (R. 456.) Judgment was entered in this case on July 9, 1965. (R. 460.) A timely petition for rehearing *en banc* was denied October 14, 1965. Justice Stewart granted petitioner's motion for an extension of time within which to file a petition for certiorari to and including March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are Sections 2(b) and 2(d) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(b), (d). (Appendix B).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals is in conflict with the decision of the First Circuit Court of Appeals in the case of *Forster Mfg. Co.* v. *Federal Trade Commission,* by requiring petitioner to possess specific foreknowledge of each of its competitors' actions, thereby extending the reasonable businessman standard established by this Court in *Federal Trade Commission* v. *A. E. Staley Co.*

2. Whether the Federal Trade Commission, affirmed by the Court of Appeals for the District of Columbia Circuit, erred in its formulation of the standard which must be met by a seller in establishing a Section 2(b) of the Robinson-Patman Act defense to a Section 2(d) finding, by holding that petitioner could not demonstrate that it was meeting its competition on a plan-meeting-plan basis.

Whether, in making a good faith meeting of competition defense under the Robinson-Patman Act, the petitioner herein has been denied Due Process of Law and a fair hearing where it has been:

(a) required to make out its defense four years after the Federal Trade Commission has established its *prima facie* case, and up to nine years after the happening of the actions in question, the delay being occasioned by the erroneous denial by the Commission of petitioner's right to rebut the finding of a violation of Section 2(d) of the Act by demonstrating that its actions were good faith attempts to meet competition under Section 2(b) of the Act, and

(b) denied the right to cross-examine the witnesses relied upon by counsel supporting the complaint in establishing the *prima facie* case of discrimination when eliciting evidence in regard to its 2(b) defense.

Whether the Commission erred in refusing to regard a "push money" payment aggregating $13.53 in value as *de minimus* and in refusing to dismiss the charge to the extent it rested upon this single act; and whether the Court of Appeals erred in failing to consider and decide this issue.

STATEMENT OF THE CASE

This case has a rather long history. It began in 57 when the Commission issued a complaint alleging at petitioner, a brassiere manufacturer, had, during e period 1954-1957, violated Section 2(d) of the ayton Act, as amended by the Robinson-Patman ct. Subsequently the complaint was amended to inide charges of violations of Section 2(e) of that

Act.[1] Specifically the complaint charged that through the use of cooperative advertising plans petitioner paid promotional allowances to some of its customers for advertising services or facilities, but did not make those promotional allowances available on proportionally equal terms to all customers competing in the resale of its products [the 2(d) violation], and that petitioner had furnished to some of its customers "the services and facilities of special personnel known as 'stylists' to assist in the resale of its products", but had failed to furnish such services or facilities to all of its competing customers on proportionally equal terms [the 2(e) violation].

Hearings were held between June and December 1958; the hearing examiner filed his initial decision on January 28, 1960, holding that petitioner had violated Sections 2(d) and 2(e). The examiner rejected petitioner's proffered "good faith meeting of competition defense" available under Section 2(b) of the Act, finding that it was not available in defense to the Section 2(d) charge, and that even though it was available as a defense to the 2(e) charge, petitioner had not made out its defense.

Petitioner appealed to the Commission. The Commission affirmed the hearing examiner. In reaching its conclusion that petitioner had violated Section 2(d) and 2(e), the Commission also construed Section 2(b) of the Act as being available against Section 2(e) charges, but not as against 2(d) charges.

Thereafter petitioner appealed the Commission's decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the

[1] 49 Stat. 1526 (1936), 15 U.S.C. 13 (d), (e) (1964).

Commission's ruling on the nonavailability of the Section 2(b) defense in a 2(d) case, and affirmed the Commission's decision in all other respects.[2] The court then remanded the case to the Commission "to afford our petitioner an opportunity to present [the] defense under Section 2(b)". 301 F. 2d at 506. The Federal Trade Commission sought review of the Court's decision in this Court by way of certiorari, but the petition was denied, with Justice Black noting that he would grant the petition. 369 U.S. 888 (1962) (Justices White and Frankfurter not participating).

Thus on June 6, 1962 more than four years after the complaint and up to nine years after certain of the alleged violations, the Commission remanded the proceeding to the hearing examiner to allow petitioner an opportunity to attempt to make out its Section 2(b) defense. Hearings were held and evidence adduced and on March 15, 1963 the examiner issued a "Revised Initial Decision after Remand" (JA 188),[3] in which he concluded that petitioner had not made out the Section 2(b) defense.

On appeal, the Commission affirmed the examiner (JA 201). Petitioner again sought review of the Commission's decision in the Court of Appeals. The Court of Appeals affirmed, with opinion, the Commission's

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[2] Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961). See *The Exquisite Form Case and the Applicability of the Meeting Competition Defense to Section 2(d) of the Robinson-Patman Act,* 48 Va. L. Rev. 574 (1962).

[3] Joint Appendix (hereinafter JA). Ten copies of the Joint Appendix used in the Court of Appeals in its second review of this case have been filed in this Court. One copy of the joint appendix utilized in the first review by the Court of Appeals has been certified as part of the record before this Court.

decision. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* — F. 2d — (1965). (Appendix A). (Petition for rehearing *en banc* denied). The court failed in this decision to pass upon several of the issues proposed for its consideration, including the question of whether petitioner's payment of $13.53 in push money to a favored customer was *de minimus* and whether the Section 2(d) charge resting on this single act should be dismissed.

This petition for certiorari is concerned only with the Section 2(d) charge, and the question of petitioner's rebutting such charge by demonstrating that its discriminations were "made in good faith" to meet the allowances for services or facilities made by its competitors to the customers who were favored by petitioner's discriminatory cooperative advertising payments and its push money payment.

During the period of time covered by the complaint, petitioner had in effect a cooperative advertising "plan", the terms of which changed from time to time.[4] The geographical area within which counsel

[4] From August 30, 1954 to January 25, 1956 Exquisite maintained a cooperative advertising plan providing for payment of sixty percent of the cost of advertisements pertaining solely to Exquisite's products placed by a retailer in certain recognized newspapers, provided that the advertisements were not less than four hundred lines. If five such advertisements were placed within a six-month interval, payment of seventy percent of the cost of each was provided. Eight advertisements within a similar interval resulted in the payment of eighty percent of the cost of each. On January 26, 1956 the lineage requirement of four hundred lines was reduced to two hundred. Thereafter, Exquisite paid fifty percent of the cost of one advertisement. For successive advertisements within a three-month period, Exquisite paid sixty percent of the cost for two, seventy percent for three, and eighty percent for four. After July 1, 1957 Exquisite agreed to pay only fifty

supporting the complaint in the original 1958 hearings sought to establish an offense was the three-city area of Patterson, Plainfield and Trenton, New Jersey. The hearing examiner, affirmed by the Commission and the Court of Appeals, found that petitioner's cooperative advertising plans were discriminatory in several respects—first, the plans discriminated against smaller customers because they could not afford to advertise on a large enough scale to be able to take advantage of the plans, and second, that discrimination resulted from petitioner's periodic departures from the plans. It was also found that petitioner had failed to make known to some if its customers the terms of its plans, and that others who at one time had been informed of the existence of the plan had not been informed of subsequent changes in the plans.

As noted, petitioner finally was permitted to put in its Section 2(b) defense in late 1962 at the hearings on remand, this occurring some four years after complaint counsel had established his *prima facie* case. Petitioner moved at the outset of the second hearing that the examiner either have the witnesses relied on by counsel supporting the complaint produced, strike their testimony, or dismiss the Section 2(d) charge to the extent it rested upon cooperative advertising prac-

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percent of the cost of all advertisements, regardless of the number placed. These allowances generally took the form of credit on future purchases of petitioner's products. Those customers who did not participate in cooperative advertising, i.e., the smaller stores which could not afford it, were offered a "premium plan", under which they could accumulate one point for each $10.00 worth of petitioner's products purchased. When a customer cumulated thirty points, he became eligible for certain premiums or prizes. This alternative plan was not in effect at all times between 1954 and 1957. Petitioner informed its customers of the existence and terms of the plans both through the trade journals and through oral notice given by its salesmen. (JA 170-73).

tices. This motion was denied, as was petitioner's interlocutory appeal therefrom to the Commission.

Thereafter petitioner attempted to make out its defense, in spite of the tremendous disadvantage it was suffering because of the fact that witnesses were no longer available, memories had dimmed, and because many of the books and records necessary to prove its defense were no longer available. (JA 330). Petitioner argued its case on two alternative bases: First, that this Court's decision in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and subsequent Court cases construing *Staley,* did not necessarily preclude a seller in making out his Section 2(b) defense from attempting to demonstrate that other competitors in the industry also were offering cooperative advertising allowances pursuant to their own plans, and that petitioner, a latecomer to the industry, had fashioned its plan in a good faith attempt to meet the competition of these other sellers; and secondly, that whether the first basis is accepted or not, petitioner had, in the instances where discrimination was found, been responding to previous advertisements run by these customers which were paid for by petitioner's competitors, petitioner's response constituting a good faith attempt to meet its competitor's specific ad-by-ad allowances.

The hearing examiner, Commission and Court of Appeals found that petitioner had not made out the defense. The decision of the Court of Appeals, which this petition seeks to have reviewed by way of certiorari, held that petitioner could not meet competition on a plan-meeting-plan basis, that petitioner had not shown sufficient foreknowledge of its competitors' actions to satisfy the *Staley* standard, and that petitioner's evidence proffered to demonstrate that it was

meeting competition in specific individual instances was insufficient to support its contentions in this regard.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, affirming the Commission, is in conflict with the decision of the First Circuit Court of Appeals in *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47, *cert. denied,* 380 U.S. 906 (1965), with respect to the "foreknowledge" that a seller must have of his competitor's activities before he can be said to be meeting his competition in good faith. This requirement of "foreknowledge" has been engrafted upon the Section 2(b) meeting of competition defense *sua sponte* by the Federal Trade Commission. This case has also been concerned with other aspects—both procedural and substantive—of the standard of proof a seller is required to meet in making the Section 2(b) defense. This Court has never before considered the question of the application of the good faith meeting of competition defense to a case where discrimination in the payment of allowances for services or facilities has been found.

The question of the applicability of the defense, and what a seller must do to prove it is also an important one to businessmen who utilize cooperative advertising and who must attempt to comply with the sometimes "elusive" requirements of the Robinson-Patman Act. It is also important to the antitrust bar whose members must interpret the Act for these businessmen. Finally, the case presents the Court with an opportunity to review the approach and attitude of the Commission toward the defense generally, and to consider the question of whether it has functioned

properly, as an expert administrative agency, accordingly to its legislative mandate.

The Commission's hostility to the meeting competition defense has been frequently remarked upon by courts and commentators alike.[5] It is necessary before considering the specific questions presented to examine briefly the Commission's negative attitude toward the defense, both for what it augurs for the present proceeding and for the defense in general.

This case would not be in the Supreme Court today if it were not for the fact that the Commission took an overly restrictive and highly tenuous view of the applicability of the Section 2(b) defense to a Section 2(d) violation at the outset of these proceedings. Despite the clear language of Section 2(b) and that of Section 2(d) and despite the fact that the legislative history clearly demonstrates that the defense was to be available to a Section 2(d) charge,[6] the Commission steadfastly refused to allow petitioner an opportunity to make out its defense. Even when ordered by the Court of Appeals to allow petitioner the opportunity to try to make its defense, the Commission and hearing examiner continued this restrictive and illiberal attitude, which severely prejudiced petitioner throughout the rest of this case. This must be well noted at the outset and must be seen in the context of

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[5] E.g., Dilks, *Meeting Competition Defense Under Robinson-Patman*, The Business Lawyer, Vo. XXI, No. 2 (Jan. 1966); Note, *Meeting Competition*, 113 U. Pa. L. Rev. 715 (1965); *FTC Position on Meeting Competition Defense*, Trade Reg. Rep. ¶ 50166 (Nov. 23, 1962); Adelman, *The Consistency of the Robinson-Patman Act*, 6 Stanford L. Rev. 3 (1953); Hally, *Meeting Competition Defense in Robinson-Patman: FTC* v. *the Courts*, Boston Coll. Ind. & Comm. L. Rev. 201; Note, 66 Yale L.J. 935 (1957).

[6] Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499, 504 (1961).

the Commission's attitude toward the defense as a whole, because it has colored and adversely affected these whole proceedings.

In view of the somewhat checkered history of the Section 2(b) defense at the hands of the Commission, it is not surprising that petitioner has encountered grave difficulty in making such defense.[7] Indeed, one

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[7] The Commission has repeatedly sought to limit the effectiveness of the Section 2(b) defense by taking a restrictive attitude toward it. Thus in Standard Oil Co. v. Federal Trade Commission, 41 F.T.C. 263, 281-83, the Commission sought to limit the defense by making it an evidentiary consideration rather than a complete defense, only to be reversed by this Court, 304 U.S. 231 (1951); by refusing to allow the defense to respondents charged with a Section 2(d) offense, Henry Rosenfield, Inc., 52 F.T.C. 1535, only to be reversed by two courts of appeals, Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); Shulton, Inc. v. Federal Trade Commission, 305 F. 2d 36 (7th Cir. 1963); by limiting the defense to the retaining of old customers and not to gain new customers, Sunshine Biscuits, Inc., CCH Trade Reg. Rep. ¶ 15,469 (1961), *rev'd*, 306 F. 2d 48 (7th Cir. 1962). The FTC chose not to seek certiorari and yet issued a public statement that it would not follow the Court of Appeals' decision. CCH Trade Reg. Rep. ¶ 50,166 (Nov. 23, 1962); by finding that area-wide price concessions are unlawful, Forster v. Federal Trade Commission, CCH Trade Reg. Rep. ¶ 16,243 (1963), rejecting dictum to the contrary in General Gas Corp. v. National Utilities of Gainsville, 271 F. 2d 820 (5th Cir. 1959); a seller may only "meet" but must not "beat" his competition, Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (2d Cir. 1945); that a seller utilizing the defense must establish that his competitor's price was for merchandise comparable in quality of materials and construction to the merchandise offered by the seller, Callaway Mills Co., CCH Trade Reg. Rep. ¶ 16,800 (1964), upsetting a contrary holding in Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, 366 (9th Cir. 1955); competitive price being met must be a lawful one; Tri-Valley Packing Assn., CCH Trade Reg. Rep. ¶ 15,893 (1962), *rev'd on other grounds*, 329 F. 2d 694 (1964); the seller must have specific foreknowledge of the actions of his competitor, Forster, *supra*, *rev'd*, 335 F. 2d 47, 53-54 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

of the Commission's own members recently had occasion to speak out against the Commission's abuses in administrative adjudication with respect to the Section 2(b) defense.[8] Specifically, Commissioner Elman criticized the Commission for its tendency to abdicate its function as an expert administrative agency in a particular case in order to lay down or fulfill broad policy objectives which may or may not have particular reference to the case under consideration. The Commission has adopted the role of an advocate and has used the devices of advocacy in cases where it is supposed to be adjudicating as an administrative fact finding body. As will become even more clear as the following points are developed, this is just such a case.

I

Conflict With the Forster Decision

Petitioner has argued its defense throughout on two alternative bases: First, that a seller is not precluded from making out the Section 2(b) defense because it has adopted a plan to meet the plans of its competitors in the industry (discussed under II, *infra*); Secondly, that petitioner has, insofar as it is able under the peculiar circumstances of this case, demonstrated that in those specific instances where discrimination was found, it was making a good faith attempt to meet the payments for cooperative advertising previously made by a competitor (i.e., meeting competition in individual competitive situations).

In order to demonstrate that it had been meeting competition in good faith in the individual specific

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[8] House of Lords, 3 CCH Trade Reg. Rep. ¶ 17,437 (Dkt. 8631, 1966) (Commissioner Elman, dissenting).

situations where discrimination was found, petitioner introduced a table listing ads of its competitors which had been run by the stores wherein discrimination by petitioner had been found. (JA 221). These ads had been paid for in part by petitioner's competitors and had been run a short time before these buyers ran the discriminatory ads paid for in part by petitioner. Petitioner was thus attempting to show that prior to its own ads competitors had paid for ads, and that petitioner's ads were nothing more than a good faith attempt to meet those of its competitors. In so doing, petitioner was attempting to comply with what it believed to be the mandate of *Federal Trade Commission,* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746 (1945), i.e., this Court's statement therein that

> the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor . . . 324 U.S. at 759-60.

Given petitioner's knowledge of the general terms of the offers or plans of its competitors, which were generally well known in the industry (JA 190; 278), and its knowledge of the fact that the ad had been run (knowledge that was available to anyone who could read), its response to the competitive challenge was, it believed, that of a reasonable and prudent businessman attempting to meet competition. The hearing examiner, affirmed by the Commission and the Court of Appeals, ruled that this evidence was not sufficient to demonstrate that petitioner was meeting its competition, *because there was no evidence demonstrating petitioner's specific foreknowledge of the actions of*

its competitors in placing the ads which preceded petitioner's ads. (JA 211).

Petitioner had maintained during the hearings that it did not have to show specific knowledge of the actions of its competitors under the *Staley* reasonable and prudent businessman standard (JA 247), and that it would be unfair to hold petitioner to such a difficult standard given the peculiar circumstances surrounding petitioner's opportunity to make out its defense. However, the hearing examiner, while pretending allegiance and rendering lip service to the *Staley* standard, broke the hope of that promise by steadfastly requiring that petitioner meet a more stringent standard, i.e., that petitioner demonstrate that it had specific knowledge prior to paying for its own discriminatory ads of a prior ad to the same customer, the name of the competitor paying for the other ad, the amount of the competitor's allowance, and the date of the ad.

Shortly after the close of the record by the hearing examiner, the Commission decided the case of *Forster Mfg. Co.* v. *Federal Trade Commission,* CCH Trade Reg. Rep. ¶ 16,423 (Dkt. 7207, 1963). In its *Forster* decision, the Commission, considering the question of the degree of knowledge a seller must demonstrate in order to sustain the Section 2(b) defense in a Section 2(a) price discrimination case, held that, (as quoted in 355 F. 2d at 55):

> a seller, to establish the defense must ascertain in advance of his cut in price not only the competitor's price he purports to be meeting but also the identity of the competitor offering the lower price. . .
>
> . . . to establish the § 2(b) defense the seller must have proof positive before its cut in price of the amount of competitive offers and the names of bidders who made them.

Immediately after the Commission's decision in the *Forster* case, but before the examiner's decision, petitioner made a motion to the hearing examiner to reopen the record so that petitioner could adduce evidence sufficient to meet the Commission's *Forster* standard, which petitioner believed to be an enlargement on or addition of a "new dimension" to the *Staley* reasonable and prudent man standard—the standard prevailing during the hearings. The examiner denied the motion to reopen and in so doing argued that,

> contrary to respondent's contention, this holding of the Commission is not novel and does not add a "new dimension" to the law, but in fact represents no change in long-established precedents. The same holding was clearly enunciated by the Supreme Court as long ago as 1945 in the Corn Products and Staley cases. (Cf. JA 211).

In affirming the examiner's denial of petitioner's motion to reopen, the Commission said that,

> in correctly denying this motion, the examiner held that *Forster,* rather than establishing a new element merely reiterated and clarified existing elements. (JA 211).

Subsequently, in its review of the Commission's *Forster* decision, the First Circuit Court of Appeals emphatically rejected this "foreknowledge" standard, characterising it as "unrealistic" since "*the requirement is stricter than that laid down in . . . Staley.*" 355 F. 2d at 55. In specifically rejecting the Commission's extrapolation on the prevailing standard the court noted:

> [O]ur 'common sense' suggests the conclusion opposite to that reached by the Commission.
>
> We may not be in as intimate touch with the ways of commerce as the Commission, but we would be

> naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonist, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F.2d 47 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965).

Translating the First Circuit's appraisal of the Commission's view of the good faith meeting of competition defense in a Section 2(a) case, into a payments for cooperative advertisements situation, it would find "unrealistic" a requirement that a seller show that it had specific foreknowledge prior to paying for its own discriminatory ads of a prior ad to the same customer, the name of the competitor paying for the other ad, and the amount of its competitor's allowance. Such a requirement defies the First Circuit's "common sense", as well it should. Such a standard of foreknowledge is indeed difficult of attainment. A seller simply cannot get the type information that the Commission requires. This is especially true in the Section 2(d) situation where competitors provide for cooperative advertising pursuant to multi-termed "plans", the terms of which change frequently. Further, most of the plans require that a series of ads be placed before mathematical calculation of the seller's participation with respect to any one ad is computed. *Not even the seller or his buyer may know what the final allowance is going to be.* Yet the Commission would require a seller trying to meet his competition to specifically meet the

prior offer, i.e., to know what neither his competitor or customer knows. Petitioner does not believe that the reasonable and prudent businessman standard announced in *Staley* stretches as far as the Commission would have it. Evidently the First Circuit does not believe so either.

After the Commission affirmed the examiner in the instant case, petitioner sought review of its decision in the Court of Appeals for the District of Columbia Circuit. Shortly after filing its petition for review in the Court of Appeals petitioner moved to have the case remanded to the Commission for purposes of adducing additional evidence as to petitioner's specific foreknowledge of its competitors' activities. Petitioner argued that the "foreknowledge" element of the Section 2(b) defense was a "new dimension", added after the close of the record but that the examiner and Commission were bound by the *Forster* decision in deciding the case. Petitioner argued that it rejected the Commission's enlargement on the standard, but that since both the examiner and Commission were bound by such standard in deciding the case, and since petitioner was not bound by the standard during the hearings, the record was incomplete and it would be unfair to petitioner to review the case without giving it an opportunity to adduce this additional evidence.[9] The Court of Appeals denied this motion to remand. Shortly after the denial by the Court of

[9] Although rejecting the enlargement on the standard, petitioner at all times demonstrated a willingness to attempt to meet it insofar as it was able under the peculiar circumstances of this case. *In spite of petitioner's willingness to try to meet the standard, neither the Commission or the Court would allow petitioner the opportunity.*

Appeals, as previously noted, the First Circuit announced its decision in *Forster,* reversing the Commission and vindicating petitioner's position. Immediately thereafter petitioner made another motion to the Court of Appeals, requesting that court to reconsider its denial of the motion to remand, in light of the First Circuit's *Forster* decision. This motion was also denied, without prejudice to petitioner's raising the question again in the brief and oral argument before the Court.

Although petitioner continued to make this argument before the Court of Appeals, in its decision, the Court of Appeals did not indicate specifically its position with respect to the *Forster* case. Instead, in considering the question of whether petitioner had met its competition in individual instances, the court held that petitioner had not shown how the table of its ads related to company policy. (Appendix A, p. 3a).

Specifically, the court stated that

> Exquisite also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission. *Ibid.*

The record before the Court of Appeals is replete with evidence demonstrating company policy,[10] which the court ignored. It also misapprehended the purpose of the table which was simply a shorthand formulation of extensive evidence, foundation for which had previously been laid on the record. Further, the court agreed with the Commission that "Exquisite Form's evidence was insufficient to support its contention". Since the Commission was relying upon the *Forster* standard in determining that petitioner's evidence was not sufficient, it is apparent that the Court of Appeals was applying the stricter *Forster* standard in the same manner as did the Commission. That is to say, although the Court of Appeals stated that it was considering petitioner's argument according to *Staley* (as did the hearing examiner and Commission), it is apparent that it would require a higher standard of knowledge of a seller's competitor's actions than *Staley* requires, again, in emulation of the examiner and Commission. This is apparent from both the

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[10] E.g., such evidence included the testimony of a Mr. Bertram Isaacs, Executive Vice President of the Advertising Checking Bureau, an organization employing over 600 persons throughout the country, which specializes in keeping track of specific cooperative advertisements placed in newspapers. (JA 238-57). This company was employed by Exquisite Form and the other brassiere manufacturers to keep track of both their own ads and those of their competitors. This organization had detailed knowledge of the specifics of all the plans of the manufacturers. (See JA 241; 245). It is their job to review the newspapers, compare the ads to the allowances given, and inform the manufacturers how those running cooperative ads measure up to the terms offered by such manufacturer. (JA 254). Exquisite's actions with respect to "company policy" are further demonstrated by the testimony of one of its chief executives and one of its salesmen, relating how Exquisite Form keeps itself informed as to its competitors' actions. (JA 278; 257-68).

court's opinion and its denial of petitioner's motion to remand and its motion for reconsideration. Petitioner demonstrated that it had done all it could as a reasonable and prudent businessman to learn about the actions of its competitors and to react to individual competitive situations. In view of the Court of Appeals' failure to find, in spite of the evidence adduced by petitioner under the circumstances obtaining in this case, that petitioner had sustained its defense, this court should recognize that the standard has been "misapprehended and grossly misapplied". *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 39 (1958).

II

Meeting Competition on a Plan-Meeting-Plan Basis

Petitioner, faced at the outset of the second hearing with the procedural problems previously noted and the restrictive attitude of the Commission toward the defense, determined that the one possible way to give the Section 2(b) defense meaning in the area of payments for services or facilities in the brassiere industry was to look at petitioner's action vis-a-vis the actions of its competitors in formulating its cooperative advertising plan in the first place. Petitioner believed this to be a proper constructional interpretation in view of the fact that the plans are designed and formulated in the first instance by competitors in relation to the plans of their competitors, and to this extent are in fact a "meeting of competition".

However, when petitioner attempted to adduce testimony and introduce evidence in support of its plan-meeting-plan theory, the hearing examiner, affirmed by the Commission, refused to allow it to do such, largely on the basis of the *Staley* case and a catalog

of Section 2(a) price fixing cases following *Staley* (JA 197; 214).[11] The view of the Commission was that *Staley* foreclosed a seller from demonstrating in the proof of his Section 2(b) defense that he was meeting the systems or plans of his competitors. Rather, the Commission relied upon *Staley* for the proposition that a seller can only make out the Section 2(b) defense by responding to competitive challenges in individual competitive situations. However, the cooperative advertising plans utilized by competitors in the brassiere industry have no relation to the pricing systems condemned in *Staley*. This Court condemned the basing point system in both *Staley* and its companion case, *Corn Products Refining Co.* v. *Fed-*

[11] To this end, petitioner attempted to introduce evidence as to the conditions which prompted it to adopt the specific terms in its plans. It attempted to show conditions prevailing in the industry which required that its plan be competitive in order to stimulate the sale of its products, including: evidence as to its relative standing in sales vis-a-vis the standing of its competitors with respect to the dollar volume of business done in the stores where discrimination was found (JA 278; 282); development of lines of inquiry which would show its national standing and that of its competitors in total brassiere sales within department stores (JA 248-50); demonstration that its competitors' plans were also not designed for small stores, and that the reason for this was that small stores simply did not generate a sufficient volume of business to make it profitable for either the store or the manufacturer to provide for cooperative advertising (JA 252); demonstration that its premium plant was designed for the small stores and intended to provide them with an alternative to the cooperative advertising granted the larger stores, and that few, if any of its competitors provided for alternatives to their plans with respect to the small stores (Cf. JA 258-59).

In each and every one of the above instances, petitioner was frustrated and denied the right to open up these lines of inquiry because the hearing examiner, affirmed by the Commission, felt that all of the above was irrelevant because *Staley* said you cannot meet a plan with a plan.

eral Trade Commission, 324 U.S. 726 (1945), because, as one of the Commissioners recently put it, "the pricing system was an illegal collusive price-fixing instrumentality". *Federal Trade Commission* v. *Calaway Mills Co.*, CCH Trade Reg. Rep. ¶ 16,800, at 21,761 (Commissioner Elman, dissenting). The Commissioner went on to point out

> that the vice in the Section 2(b) defense offered by the basing point respondents was not that they were responding to their competitors' pricing conduct in accordance with a plan or schedule, but that a basing-point plan or schedule cannot be a *bona fide* method of meeting competition, since it is intended, rather, to eliminate competition.

Clearly the plan utilized by petitioner bears no resemblance, either in theory or practice, to that condemned in *Staley* and cases which have followed *Staley*. (JA 197). The error of the hearing examiner and Commission in their mechanistic approach to the theory of meeting competition on a plan-meeting-plan basis has been their failure to distinguish between a *plan*, an offer and an acceptance. The plan is nothing more than a formalized articulation of the terms of the seller's offer to his customers of his willingness to participate in the costs of the advertising undertaken by the buyer to promote the seller's products. The fact that a seller adopts a cooperative advertising *plan* does not mean that he is foreclosed from the Section 2(b) defense because *Staley* says you cannot meet a plan with a plan. The use of the words plan or system in the abstract means nothing. It is simply the seller's

offer to his buyers. In a specific competitive situation, a seller is merely making an allowance pursuant to his existing offer. However, in order to appreciate what goes into the specific allowance made in a specific competitive situation, it is necessary to have knowledge of what has gone into the formulation of the general offer in the first place. Petitioner was frustrated in this effort by the Commission's failure to appreciate that *Staley* does not condemn plans *qua* plans. Every time the word plan has been mentioned in this case, whether to the hearing examiner or Commission, the automatic response has been that *Staley* says no. (JA 197; 214). This mechanistic jurisprudence hardly comports with the Commission's congressionally mandated obligation to function as an expert administrative agency.

Had petitioner been able to adduce the evidence it proposed to adduce under its plan-meeting-plan theory (note 11, *supra*), it would have established that petitioner's plan or offer was in fact a good faith attempt to meet the plans or offers of its competitors. And it is petitioner's good faith which is most important to the question of the Section 2(b) defense, not the fact that petitioner embodied the terms of its offer in a formal plan. *House of Lords, supra;* Note, *Meeting Competition,* 113 U.Pa. L.Rev. 726 (1965). Petitioner would also have shown by this evidence that, both in the formulation of the terms of its plan or offer and in responding to specific competitive challenges under its plan, it was responding in a manner *justified* by the competition it was meeting. This demonstration was clearly relevant both under *Staley*

and the legislative history of the Act.[12] Thus it is clear that the overly restrictive attitude of the Commission and the hearing examiner with respect to the plans-meeting-plans question prejudiced petitioner in the making of its Section 2(b) defense.

III

Denial of Procedural Due Process and a Fair Hearing

In addition to taking a restrictive, grudging attitude toward the substantive requirements of Section 2(b), the Commission, affirmed by the Court of Appeals, has carried this attitude and approach over into the procedural aspects of the defense. Specifically, petitioner believes that the Commission erred procedurally in the following respects:

1. Establishing the Section 2(b) Defense by Cross-Examination:

Petitioner moved at the outset of the hearings on remand either to have the witnesses relied upon by counsel supporting the complaint for the *prima facie* charge produced, to strike their testimony, or to dismiss the 2(d) charge to the extent it rested upon cooperative advertising practices. In support of the motion

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[12] This Court declared in its *Staley* decision that the revised language of what is the present Section 2(b) was introduced "for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination". *Staley, supra* at 752-53. This analysis is consistent with the legislative history of that Act; for example, Congressman Utterback, commenting on H.R. 8442, whose language later became Section 2(b) stated: "It leaves it a question of fact to determine in each case whether the competition to be met was such as to justify the discrimination given . . . and whether the way in which the competition was met lies within the latitude allowed by these limitations." 80 Cong. Rec. 9418, June 13, 1936.

petitioner argued that but for the examiner's erroneous refusal to permit the defense in the first hearing, petitioner would have been entitled to develop this defense in the course of its cross-examination of witnesses during the presentation of the case in chief by counsel for the complant in 1958. Petitioner further argued that to deny the motion would deprive it of Due Process of law under the Fifth Amendment; that it would not comport with even the basic rudiments of administrative fair play; and that it would be contrary to the letter and spirit of the Administrative Procedure Act, 5 U.S.C. § 1006(c). ("Every party shall have the right to present his case or *defense* . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts".) In addition to these authorities, petitioner cited to the hearing examiner *his own action* in the first hearing, when he permitted petitioner to pursue its Section 2(b) defense to the Section 2(e) charge by cross-examination of complaint counsel's witnesses relied upon to support the *prima facie* charge. However, in spite of these authorities and despite the fact that the hearing examiner's own action was clearly established on the record, he disavowed this position in the remand hearings, denying petitioner the right of cross-examination. (See colloquy set out at Appendix C).

The Commission, in affirming the examiner's second decision, in effect held that petitioner had the right to develop an affirmative defense through cross-examination of complaint counsel's witnesses. *However, despite this it held that "we do not believe that the instant respondent could have supplied the missing element of its defense by a cross-examination of these particular witnesses".* (JA 220). (Emphasis added.)

The Court of Appeals, although the question was urged upon it with much vigor both in the briefs and at the oral argument, completely ignored the cross-examination question.

The Court of Appeals erred in failing to recognize petitioner's right of cross-examination in making out its Section 2(b) defense and the Commission erred in its determination that petitioner could not have made out its defense by cross-examination. The question was and is not whether the Commission thinks that petitioner could not have made out the defense, in speculating on what petitioner may have been able to prove had it had the opportunity. The question is whether petitioner had the right to such opportunity for cross-examination. The Commission did not deny that this right exists; it simply attempted to remedy the error by speculating on what *might* have occurred had petitioner had its rightful opportunity. This Court should not allow the Commission's action in this regard to go unchallenged; petitioner was denied a fundamental right and no amount of "speculation" by the Commission can change this fact. The right of cross-examination is absolutely fundamental to the making out of a defense, whether the case be criminal, civil, or administrative.[13] This fundamental right should not be sacrificed to the Commission's desire to bring about ease of administration of the Robinson-Patman Act.

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[13] Reilly v. Pinkus, 338 U.S. 269 (1949); Powhatan Mining Co. v. Ickes, 118 F. 2d 105 (6th Cir. 1941). See also 2 Davis Administrative Law § 329.

2. Staleness of the Record:

Petitioner's argument here relates to the question of the great length of time intervening between the happening of the events in question in this case and the point in time when petitioner was called upon to defend its prior actions. This great lapse of time, amounting to as much as *nine years* (1954-1963) in some instances, causes the evidence relied upon by the Commission and affirmed by the court to be denominated "cold and stale evidence". Not only was the evidence cold, dated, and stale, but petitioner was required to attempt to *tie it to a record that had been established more than four years prior to the time the defense was put into evidence!* In spite of this fact, both the Commission and the Court of Appeals refused petitioner's argument that the complaint should be dismissed because of the utter impossibility of petitioner's having a fair opportunity, under the peculiar conditions of this case, to put in its defense. Although the Commission denied petitioner this relief (JA 219), it has itself accorded it to at least three other respondents since it considered petitioner's case. Specifically, in *Bearings, Inc., et al,* CCH Trade Reg. Rep. ¶ 16,768 (Dkt. 7134, 1964) Chairman Dixon, speaking for the Commission, dismissed a complaint against the respondent because:

> during the course of our detailed examination of the record on appeal, we could not fail to be impressed by the fact that the vast majority of the evidence has to do with incidents, events and conversations the most recent of which took place in 1957. *Id.* at 21,702-03.

With the record in that proceeding in such a state, the Commission decided that "it would serve no useful

purpose to make an adjudication on a record composed as this one is of cold and stale evidence." *Id.* at 21,703. The delay in that case was six years at its greatest; *here the delay was up to nine years!* Several more recent cases of the Commission support this argument even more forcefully. The first of these is *Admiral Corp.*, 3 CCH Trade Reg. Rep. ¶ 17,230 (Dkt. 7094, 1965). This was a case which began in 1958 and which also grew out of the Commission's erroneous refusal to allow the Section 2(b) defense to a Section 2(d) charge. During protracted hearings, the respondent moved for the issuance of *subpoenas duces tecum* to its competitors for purposes of making its Section 2(b) defense to the Section 2(d) charge. The examiner, affirmed by the Commission, refused to authorize the subpoenas because the defense was held inapplicable to the 2(d) charge. However, after the decision of the Court of Appeals for the District of Columbia Circuit in the first *Exquisite Form* case,[14] the issuance of such subpoenas became proper. In considering subsequent subpoena requests, the hearing examiner held that the respondents had not renewed their requests for subpoenas in time, and consequently, the record would not be reopened. Before the Commission, the respondent argued that the 2(d) charge should be dropped because, even if the subpoenas had been issued, their issuance would in all likelihood be unproductive in view of the long passage of time. The Commission, in dismissing the Section 2(d) charge, stated that "we cannot agree that the respondent was afforded a proper and adequate opportunity to present its defense". *Id.* at 22,305. The Commission went on

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[14] *Supra*, note 2.

to make the following statement which petitioner believes to be controlling for our case:

> It cannot be denied that the respondent has been disadvantaged by the delay. The documentary evidence adduced by complaint counsel in support of their case was fresh and they had the advantage of testimony concerning events in their witnesses' very immediate past. The hearing examiner's ruling would force respondent to rebuttal with dated evidence of less reliability. Respondent's ability to defend with evidence of comparable probity and reliability has been harmed therefore *through no fault of its own* . . . it is our conclusion that *equity decrees dismissal. Id.* at 22,307. (Emphasis added.)

Petitioner's case stands on even stronger ground with respect to the above argument since petitioner was disadvantaged over an even greater length of time than the respondent in *Admiral.* In view of the Commission's decision in *Admiral,* its failure to dismiss the complaint in this case with respect to the Section 2(d) charge is a classic case of arbitrary administrative action. As such it should not be allowed to stand by this Court. See also *Beatrice Foods,* 3 CCH Trade Reg. Rep. ¶ 17,311 (Dkt. 7599, 1965) wherein the Commission held:

> The allegedly discriminatory allowances date back to 1959. Any evidence which respondent would have to adduce would in all probability not be found in written records but in the memories of witnesses which may have faded by now.
>
> We are not convinced that any useful purpose would be served *nor even that due process could be achieved* by remanding this case now to a hear-

> ing examiner six years after the facts to hear additional evidence. *Id.* at 22,472. (Emphasis added.)

Again, it must be noted that petitioner's opportunity to put in its defense did not come until up to *nine years* after the alleged offenses. Certainly the above authorities and common sense clearly demonstrate that the action of the Commission and the Court of Appeals in failing to dismiss the complaint was erroneous.

IV

Failure to Dismiss the "Push Money" Charge as De Minimus

The controversy concerning the "push money" issue centers around payments made by petitioner, at the rate of 11 cents per brassiere sold, to personnel of Rosenbaum's in Plainfield, New Jersey. The examiner, affirmed by the Commission, found that petitioner did not grant or offer to grant allowances for similar services, on proportionally equal terms, to other customers who competed with Rosenbaums.

In attempting to rebut the above findings, petitioner argued that because the Rosenbaum store had *gone out of business* during the lengthy period intervening betwen the filing of the complaint and the making of the defense, records pertinent to making out such defense were no longer available, personnel who may have taken part in such promotions were likewise unavailable, and most importantly, records which might have shown that competitors had made like "push money" allowances were destroyed. Petitioner argued further, in a motion to dismiss the push money charge (made as part of the previously mentioned motion to pro-

duce witnesses for purposes of cross-examination) that because of the unavailability of proof, petitioner was effectively deprived of opportunity to defend against this Section 2(d) charge relating to push money. The motion was denied.

Petitioner also argued that because the single push money payment aggregated only $13.53, the charge should be dismissed with respect to it because such a payment was *de minimus.* This argument was also rejected. The push money question was proposed to the Court of Appeals as question three of the questions presented in its brief. However, the court wholly failed to consider this question, even though extensive argument was made with respect to the question in petitioner's brief.

Petitioner respectfully submits that this Court should redress the failure of the Court of Appeals to consider this question by ordering the "push money" charge dropped from the complaint, either because of the prejudice caused to petitioner by the delay, or because the single $13.53 payment was *de minimus;* alternatively, this Court should remand this case to the Court of Appeals and require it to pass upon this question.

CONCLUSION

In the House of Lords decision, *supra,* Commissioner Elman stated, in a strong dissent, that the time has come for the Commission to reexamine its approach to Section 2(b) of the Act, and to bring it into harmony with the rest of the other antitrust provisions; petitioner submits that it is likewise time for this Court

to review the actions of the Commission. Wherefore the petitioner prays that a writ of certiorari be granted so that the important questions raised by this petition might be reviewed on the merits, or so that the case might be remanded to the Commission to allow petitioner its long-denied opportunity to meet the Commission's strict specific foreknowledge requirement.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18524

EXQUISITE FORM BRASSIERE, INC.,
A CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the
Federal Trade Commission

Decided July 2, 1965

Mr. Peyton Ford for petitioner. *Mr. Urban A. Lester* also entered an appearance for petitioner.

Mr. Lester A. Klaus, Attorney, Federal Trade Commission, with whom *Mr. James McI. Henderson,* General Counsel, and *Mr. E. K. Elkins,* Attorney, Federal Trade Commission, were on the brief, for respondent. *Mr. Thomas F. Howder,* Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before PRETTYMAN and BASTIAN, Senior Circuit Judges, and BURGER, Circuit Judge.

PRETTYMAN, *Senior Circuit Judge*: This is the second time this controversy has been in this court. It is a peti-

tion to review a decision of the Federal Trade Commission. Exquisite Form was charged with violating Section 2(d) of the Robinson-Patman Act[1] by making discriminatory advertising allowances to customers. The Commission found a violation. The company appealed to this court. We affirmed the Commission on this point.[2] However another controversy at that stage was whether or not a defense, meeting the competition in good faith, which was authorized by a proviso in Section 2(b) of the statute, was available to a person guilty of discriminating in violation of Section 2(d) of the statute, which declares it to be unlawful for a person to pay anything for the benefit of a customer for services or facilities provided by such customer, unless the payment or consideration is equally available to all other customers. The Commission had held that the defense was not available in such cases. We held that it is available and remanded the case for the Commission to hear Exquisite Form on that defense.[3] Hearing was held, and the Commission held that Exquisite Form had not established the defense by proof. The present case is on review of that decision.

Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case. Admittedly

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[1] 49 STAT. 1527 (1936), 15 U.S.C. § 13(d) (1963).

[2] Exquisite Form Brassiere, Inc. v. FTC, 112 U.S. App. D.C. 175, 301 F. 2d 499 (1961), *cert. denied*, 369 U.S. 888 (1962).

[3] *Ibid.*

the Supreme Court has held[4] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition."[5] Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.

We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.

Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.

Affirmed.

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[4] FTC v. A. E. Staley Co., 324 U.S. 746 (1945).

[5] *Id.* at 753.

APPENDIX B

Statutes Involved

Section 2 of the Clayton Act, as amended, provides in pertinent part (49 Stat. 1526, 15 U.S.C. 13):

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
>
> (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.

APPENDIX C

Q. What date or approximate date did Exquisite Form Brassiere Company furnish to your store a stylist?

A. The exact date was November 13th, 1957. Miss Pearl Ringel.

Q. Is that the only time that Exquisite Form Brassiere Company furnished to Tepper's the services of a stylist?

A. Yes.

Q. At the time that the stylist was there, Miss Albanese, did Exquisite Form Brassiere Company and Tepper's Store engege in cooperative advertising which included reference to the stylist being there?

A. Yes. We received cooperation in any case.

Q. But particularly in that case? I want to know if the cooperative advertising at that time included reference to the use of the stylist?

A. Yes.

Q. And Tepper's paid part of the cost of that advertising and Exquisite Form paid part of the cost of that advertising?

A. Right.

Q. And that was in the same manner that other cooperative advertising was paid for during that year by both Exquisite Form and Tepper's?

A. Yes.

Q. Miss Albanese, what competing manufacturers of brassieres, that is, competitors with Exquisite Form, also furnished to Tepper's the use of stylists?

Mr. Dias: Your Honor, I'd like to make an objection to the introduction of what is obviously a defense of meeting competition that is arising here and I realize it's just a pro forma objection. I am aware of the ruling in the Rosenfeld case but I'd like to be able to preserve any rights I may have for future appeal or future briefing and for that reason it's my position that the meeting of competition is not a defense to a 2(e) count and for that reason, I object to this type of testimony.

Mr. Cassedy: If Your Honor please, I might as well get my position on both (d) and (e) sub-sections. I will contend that meeting competitors' advertising allowances and the services and facilities of the stylists are all defense rights of this respondent. We will contend that in furnishing cooperative advertising and the use of stylists we were meeting the practice of the industry and particularly competitors who manufactured brassieres and sold the same customers.

Hearing Examiner Piper: The objection is overruled with respect to 2(e), but you may have a continuing objection to that line of testimony in order to preserve your position.

Mr. Dias: Thank you.

Hearing Examiner Piper: As far as 2(d) is concerned, while you have not made an objection, now Mr. Cassedy has stated his position and I don't agree with it. The Commission has held that cost justification and the good faith meeting of competition are not defenses available under Section 2(d). Therefore, I will not permit testimony tending to establish a good faith meeting of competition under 2(d) but I will under 2(e).